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No. 03-768

Supreme Court, U.S.
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In the Supreme Court of the United States

HSIEN I. PENG,

Petitioner,

v.

MEI CHIN PENG HU; JONATHAN HU,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The published opinion of the Ninth Circuit should not be allowed to stand, because it incorrectly holds that a private party who receives overt, significant assistance of state officials in effecting a false arrest of an individual can only be held liable under 42 U.S.C. § 1983 by necessarily requiring a further finding of a co-conspiracy between the State and the private party to deprive the individual of his or her constitutional rights.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari and the Ninth Circuit Opinion demonstrates the confusion surrounding the proper standard of review. The Court should directly address the proper standard of review in the case of a false arrest as to what satisfies § 1983's "under color of state law" requirement to establish a right to recover against a private defendant.

REASONS FOR GRANTING THE WRIT

I. THE PROPER STANDARD OF REVIEW IN THE CASE OF A FALSE ARREST AS TO WHAT SATISFIES 42 U.S.C. § 1983'S "UNDER COLOR OF STATE LAW" REQUIREMENT TO ESTABLISH A RIGHT TO RECOVER AGAINST A PRIVATE DEFENDANT IS AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner asks this Court to articulate and clarify 42 U.S.C. § 1983's "under color of state law" requirement to establish a right to recover against a private defendant in the case of a false arrest. The Court has never directly addressed the question presented in the Petition for Writ of Certiorari.

Accordingly, this is "an important question of federal law that has not been, but should be, settled by this *Court.*" Sup.Ct.R. 10(c).

The Respondents' Brief in Opposition to the Petition for Writ of Certiorari, as does the Ninth Circuit Opinion, mischaracterizes this Court's prior case law.

Respondents' reliance on Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) is misplaced. In Adickes, this *Court was presented* with a claim by the petitioner of an alleged violation by the respondent of her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment actionable under 42 U.S.C. § 1983 by reason of racial discrimination.

Petitioner, a white woman, was denied access to a public library and service in the respondent's restaurant because she was in the company of her black students and was shortly therafter arrested after leaving the restaurant on the charge of vagrancy by a policeman who previously came into the restaurant and observed her in the company of her students. Id., 398 U.S. at 149, 90 S.Ct. at 1604.

In Adickes, the petitioner specifically alleged in her complaint that the violation of her equal protection rights was the result of a conspiracy between the State and the respondent who was a private defendant. Id., 398 U.S. at 149, 90 S.Ct. at 1604. This Court held that the allegation of such a conspiracy "**plainly** provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful." Id., 398 U.S. 152, 90 S.Ct. 1605 (internal citations omitted) (emphasis added). As the Court emphasized, the petitioner

would clearly be entitled to relief under § 1983 if she could establish that the respondent somehow reached an understanding with the police to deprive petitioner of her constitutional rights. Id., 398 U.S. at 152, 90 S.Ct. at 1605.

While a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983 for being jointly engaged in the prohibited action, the Court never suggested in Adickes that a conspiracy requirement was a necessary predicate in all cases of the "joint participation" test.

In Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), the Court held that a private litigant in a civil case may not use peremptory to exclude jurors on account of race. The Court held that "[a]lthough the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional restraints." Id., 500 U.S. at 618, 111 S.Ct. at 2082.

The analytical framework used by the Court in determining "state action" for purposes of finding a violation of the Equal Protection Clause by the private respondent Leesville Concrete Co., Inc., was the two-part inquiry set forth in Lugar v. Edmonson Oil Co., 457 U.S. 922, 939-942, 102 S.Ct. 2744, 2754-2756, 73 L.Ed.2d 482 (1982). Id., 500 U.S. at 618-622, 111 S.Ct. at 2082-2083. As in Lugar, the Court asked first whether the claimed constitutional, deprivation resulted from the exercise of a right or privilege having its source in state authority; and second, whether the private party charged with the deprivation could be described

in all fairness as a state actor. Id., 500 U.S. at 622, 111 S.Ct. at 2083.

In analyzing the second part of the part of the Lugar test to determine whether a particular action or course of conduct is governmental in character, the Court held in Edmonson that it is relevant to examine the following: (1) the extent to which the actor relies on governmental assistance and benefits[1]; (2) whether the actor is performing a traditional governmental function; and (3) whether the injury caused is aggravated in a unique way by the incidents of government authority[2].

There can be no question that the first part of the Lugar inquiry is satisfied in this case. Respondents' report and request for assistance from law enforcement leading to petitioner's arrest has no significance outside of a legal framework of governmental power and authority. The Ninth Circuit recognized this fact when it held that "[c]learly, the arrest [of petitioner] was a state action." (App. B at 21a) .

Respondents' actions in this case also satisfy at least two of the three relevant factors cited in Edmonson in analyzing the second part of the Lugar test. Respondents' report to law enforcement for assistance made extensive use of state procedures with "the overt, significant assistance of state officials." Id., 500 U.S. at 622, 111 S.Ct. at 2084. Clearly without law enforcement's overt and significant assistance, a

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[1] Citing Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) and Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) .

[2] Citing Shelly v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

citizen's report of this sort simply could not exist. Moreso, petitioner's ultimate arrest, the source of the constitutional injury, was uniquely satisfied by the incidents of governmental authority. This case is not about a citizen's arrest but an arrest directly effected by law enforcement upon the alleged false information provided by respondents.

What is significant in this case as it was in Edmonson in finding "state action" is that private individuals invoked the power and instrumentalities of the State within a state sanctioned legal framework not on whether the respondents reached an understanding with law enforcement to deprive petitioner of his constitutional rights.

As noted in the Petition for Writ of Certiorari, the fact-bound inquiry required in finding respondents' actions liable under § 1983 should not focus on the issue of a co-conspiracy but whether respondents' alleged false statements to Deputy Gage caused petitioner to be deprived of his constitutional rights. See Kilbourn v. Thompson, 103 U.S. 168, 200, 26 L.Ed. 377, 13 Otto 168 (1880) (holding that legislators directing an arrest are as responsible as those who effected the arrest); Malley v. Briggs, 475 U.S. 335, 344 n. 7, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (holding that an individual will be "responsible for the natural consequences of his actions.").

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Ninth Circuit judgment be reversed.

Dated: February 13, 2004

Respectfully submitted,

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